

(26,262)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 795.

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EMILY R. DE GANAY

*vs.*

EPHRAIM LEDERER, COLLECTOR OF INTERNAL  
REVENUE.

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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE THIRD CIRCUIT.

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Original. Print

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1 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1917.

No. 2230.

EMILY R. DE GANAY, Plaintiff Below,

vs.

EPHRAIM LEDERER, Collector.

*Certificate to the Supreme Court.*

The Judges of the Circuit Court of Appeals for the Third Circuit desire the instruction of the Supreme Court upon a question of law that has arisen in the foregoing case, and hereby respectfully certify the question with a statement of the facts upon which the question arises:

The plaintiff in the district court and in the Court of Appeals is Emily R. de Ganay, who is a citizen of France, and resides in that country. Her father, who was an American citizen domiciled in Philadelphia, died in 1885, and devised one-fourth of his residuary estate (consisting of real property) to The Pennsylvania Company for Insurance on Lives and Granting Annuities, in trust to pay the net income thereof to her. From the same source she inherited also a large amount of personal property in her own right free from any trust. This personal property is invested in stocks and bonds of corporations organized under the laws of the United States and in bonds and mortgages secured upon property in Pennsylvania.

2 Since 1885 the Pennsylvania Company, &c., has been acting as her agent under a power of attorney, and has invested and reinvested her property and has collected and remitted to her the net income thereof. The physical certificates of stock, the bonds and the mortgages have been and are now in the Company's possession at its office in Philadelphia.

Upon the demand of the defendant, who is the Collector of Internal Revenue for the 1st District of Penna., the Company made a return of the income collected for the plaintiff during the year 1913, showing that her income from the real estate held by the Company in trust under her father's will was \$7,989.43, and that her net income from the corporate stocks and bonds and the bonds and mortgages held by her in her own right was \$74,769.38. These sums were remitted to her. Upon this return the defendant assessed an income tax under the Act of October 3, 1913, Chapter 16 (38 Statutes at Large, 114), aggregating \$1,776.62. In June 1914 this was paid under protest and threat of distraint, and afterwards the Commissioner of Internal Revenue refused an application for the refund of this amount, whereupon the present action was brought. The trial

was without a jury under R. S. 649 and 700, and the District Court entered judgment for the defendant, both as to the income received from the real estate held in trust, and as to the income received from the personal property owned by the plaintiff in her own right. The question now certified is limited to the net income collected by virtue of the power of attorney from the personal property owned by the plaintiff in her own right.

The tax was assessed and levied under Section 2 A, Subdivision 1, of the Act of October 3, 1913, Chapter 16, namely:

"That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned, and of every business, trade or profession carried on in the United States by persons residing elsewhere."

The question of law upon which this Court desires the instruction of the Supreme Court, is as follows:

If an alien non-resident owns stocks, bonds and mortgages secured upon property in the United States or payable by persons or corporations there domiciled; and if the income therefrom is collected for and remitted to such non-resident by an agent domiciled in the United States; and if the agent has physical possession of the certificates of stock, the bonds and the mortgages; is such income subject to an income tax under the Act of October 3rd, 1913?

(In case the Supreme Court should desire to examine the power of attorney referred to above, a copy is annexed hereto.)

(Signed)

JOS. BUFFINGTON,  
JOHN B. McPHERSON,  
VICTOR B. WOOLLEY,  
*Circuit Judges.*

Endorsed: No. 2230. Certificate of Questions for Supreme Court. Received and filed Dec. 11, 1917. Saunders Lewis, Jr., Clerk.

#### *Power of Attorney.*

Know all men by these presents, That I Emily R. de Ganay, widow, of the City of Paris, Republic of France, do make, constitute and appoint the Pennsylvania Company for Insurance on Lives and Granting Annuities, my true and lawful attorney for me and in my name and to my use, to ask, demand, sue for and receive all sums of money and securities now due or which may hereafter become due and payable to me in any manner whatsoever, and upon receipt of same to sign, seal, execute and deliver all necessary acquittances and discharges therefor; to manage, let and demise any real estate now belonging or that may hereafter belong to me, to enter and re-enter

upon the same, taking possession thereof from time to time as shall be desirable, to give notice to quit and the like, to collect all rents due and to become due, with power to institute actions at law in my name, and to conduct all manner of proceedings at law by distraint or otherwise, which to them shall seem proper and necessary; to grant, bargain, and sell at public or private sale any real estate, lands, tenements or hereditaments of which I am now or may hereafter become seized and possessed or in which I may have or hereafter acquire any interest, for any price or considerations with any reservations, restrictions or conditions, to receive the purchase money and to sign, seal, execute, acknowledge and deliver all deeds, conveyances or other instruments necessary to the purchaser and to make and execute any releases, agreements or contracts, by deed or otherwise in their discretion deemed necessary and expedient in the premises. To sell, assign, transfer any stocks, bonds, loans, or other securities now standing or that may hereafter stand in my name on the books of any and all corporations, national, state, municipal or private, to enter satisfaction upon the record of any indenture or mortgage now or hereafter in my name, or to sell and assign the same and to transfer policies of insurance, and the proceeds, also any other moneys to invest and reinvest in such securities as they may in their discretion deem safe and judicious to hold for my account; to collect and receipt for all interest and dividends, loans, stocks, or other securities now or hereafter belonging to me, to endorse checks payable to my order and to make or enter into any agreement or agreements they may deem necessary and best for my interest in the management of my business and affairs, also to represent me and in my behalf, to vote and act for me at all meetings connected with any Company in which I may own stocks or bonds or be interested in any way whatever, with power also as attorney or attorneys under it for that purpose to make and substitute, and to do all lawful acts requisite for effecting the premises, hereby ratifying and confirming all that the said attorney or substitute or substitutes shall do therein by virtue of these presents.

In witness whereof, I have hereunto set my hand and seal the Twelfth day of November in the year of our Lord one thousand nine hundred and Six (1906).

EMILY R. DE GANAY. [SEAL.]

Signed, Sealed and Delivered in the presence of  
HANSON C. COXE.  
JACK M. BAKER.

6 UNITED STATES OF AMERICA,  
*Eastern District of Pennsylvania,*  
*Third Judicial Circuit, sct.:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original Certificate of Questions for

the Supreme Court of the United States in the case of Emily R. De Ganay, Plaintiff in Error, vs. Ephraim Lederer, Collector, Defendant in Error, No. 2230, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this eleventh day of December in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-second.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,

*Clerk of the U. S. Circuit Court of Appeals, Third Circuit.*

Endorsed on cover: File No. 26262. U. S. Circuit Court Appeals, 3d Circuit. Term No. 795. Emily R. de Ganay vs. Ephraim Lederer, Collector of Internal Revenue. (Certificate.) Filed December 19th, 1917. File No. 26262.

2.  
**No. 319.**

FILED  
**APR 21 1919**  
**JAMES D. WAHER,**  
**OCTOBER TERM, 1918.**

**IN THE**  
**Supreme Court of the United States**

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**EMILY R. DeGANAY, Plaintiff Below,**

**vs.**

**EPHRAIM LEDERER, Collector of Internal Revenue,**  
**Defendant Below.**

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**ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT**  
**COURT OF APPEALS FOR THE THIRD CIRCUIT. TO**  
**OCTOBER TERM, 1917, NO. 2230.**

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**[File No. 26262.]**

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**BRIEF FOR EMILY R. DEGANAY.**

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**JAMES WILSON BAYARD.**

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IN THE  
Supreme Court of the United States.

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OCTOBER TERM, 1918. No. 319.

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*Emily R. DeGanay, Plaintiff below,*

vs.

*Ephraim Lederer, Collector of Internal Revenue, Defendant  
below.*

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ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT. TO OCTOBER  
TERM, 1917, No. 2230.

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[File No. 26262.]

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**BRIEF FOR EMILY R. DEGANAY.**

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I. STATEMENT OF THE CASE.

Emily R. DeGanay, a French citizen residing in France,  
owned in 1913, clear of any trust, a large amount of per-

sonal property consisting of stocks and bonds of corporations organized under the laws of the United States and bonds and mortgages secured upon property in Pennsylvania. Since 1885 The Pennsylvania Company for Insurances on Lives and Granting Annuities, a corporation of Pennsylvania, has acted as her agent, investing and reinvesting her property and collecting and remitting to her the net income. The physical papers—certificates of stock, bonds and mortgages—have at all times been in its possession as her agent in Philadelphia.

In 1914 the defendant as Collector of Internal Revenue demanded from the company as plaintiff's agent a return of the plaintiff's income for 1913 collected by it, and on this return he assessed against the plaintiff a tax of \$1,776.62 as income tax under the Act of 3rd October, 1913, Chapter 16 (38 Statutes at Large, 114). This sum was paid in June, 1914, under protest and to avoid distraint. An application for refund was refused by the Commissioner of Internal Revenue, and the present action was then brought to recover the amount paid.

The case was tried in the District Court before Judge Dickinson without a jury, and in an opinion reported in 239 Federal Rep. 568 he found for the defendant. From this judgment a writ of error was taken to the United States Circuit Court of Appeals for the Third Circuit. The question involved is purely one of law on the construction of the Act of 3rd October, 1913. There was no dispute upon the facts.

That Court has requested from this Court instruction on the question of law so arising in the following language:—

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## II. STATEMENT OF THE QUESTION INVOLVED.

If an alien non-resident owns stocks, bonds and mortgages secured upon property in the United States or payable by persons or corporations there domiciled, and if the income therefrom is collected for and remitted to such non-resi-

dent by an agent domiciled in the United States, and if the agent has physical possession of the certificates of stock, the bonds and the mortgages, is such income subject to an income tax under the Act of October 3rd, 1913?

### III. ARGUMENT FOR PLAINTIFF.

The question for decision by this Court is whether the plaintiff is within the purview of the Revenue Act of 1913. She claims that as she is a citizen of a foreign State residing abroad and is not engaged in business in the United States, no part of the moneys remitted to her in France from her agent here and arising from her investments in stocks and bonds of American corporations or in bonds secured by mortgages on property located in the United States, is liable to taxation under that Act.

The "Act to reduce tariff duties and to provide revenue for the government and for other purposes," approved October 3d, 1913, Chapter 16 (38 Stats. at Large 114) by Section 2 (a), Subdivision 1, provides as follows:—

"That there shall be levied, assessed, collected and  
 "paid annually upon the entire net income arising or  
 "accruing from all sources in the preceding calendar  
 "year to every citizen of the United States, whether  
 "residing at home or abroad, and to every person  
 "residing in the United States though not a citizen  
 "thereof, a tax of one percentum per annum upon  
 "such income except as hereinafter provided: and  
 "a like tax shall be assessed, levied, collected and  
 "paid annually upon the entire net income from all  
 "property owned and of every business, trade or pro-  
 "fession carried on in the United States by persons  
 "residing elsewhere."

The second subdivision of the same section provides for the supertax to be assessed upon the same parties.

Some reference was made in the argument in the Court below to certain other provisions of the Act relative to the mode in which the tax should be assessed and collected. None of these provisions, however, throws any light upon the question arising here. They do not in any way relate to the scope of the Act, but only to the method of its enforcement. We are, therefore, brought to the consideration of the meaning of the clause which we have quoted.

It will be observed that the tax is levied, first, upon every citizen of the United States, wherever he resides; second, upon every person residing in the United States, whatever his citizenship, and, third, "upon the entire net income from all property owned and of every business, trade or profession carried on in the United States by persons residing elsewhere."

Madame deGanay is not a citizen of the United States or a resident thereof. She is not engaged in any business, trade or profession carried on in the United States. We are brought down, therefore, to the question whether the Act in levying a tax "upon the entire net income from all property owned \* \* \* in the United States by persons residing elsewhere," has reached the various classes of property owned by the plaintiff in error.

The case was very fully argued before the learned Judge in the United States District Court. His opinion is reported in 239 Fed. Rep. 568. His conclusions from a rather extended discussion, are thus stated (page 572):—

"We accept the general principle advanced by counsel for the United States that in the Federal jurisdiction, as in that of some of the States, although it is otherwise in most jurisdictions, revenue statutes are to be so construed as to promote their main purpose, and that the principle of a strict construction in favor of the tax-payer is repudiated."

This we shall show is an entirely erroneous statement of the law as laid down by this Court.

On this fundamental error he builds necessarily an erroneous conclusion. He says (page 573):—

“To return from these abstractions to the precise question before us, our conclusion is that this Act of Congress, if read in the light of critical accuracy, does not tax the property on which this tax was levied, but if the language is interpreted in the light of the commonly accepted meaning of the words used, it does tax it, and the tax was properly collected.

“This finding results in a judgment for the defendant, with costs, which judgment is directed to be entered.”

He adds (page 575):—

“The question before us is recognized as a close one. Where the meaning of a statute is doubtful, and either of two constructions may be given it, the choice is always more or less an arbitrary one, and the ruling made partakes too much of the ‘rescript’ character to be entirely satisfactory. The choice, however, must be made, and we have made the best choice we could.”

We will discuss the authorities to which he refers in the course of this brief. But we submit that the principle upon which he bases his conclusion is wrong; that we are not dealing, as we often are in the case of wills, with words used in their popular, as distinguished from their legal and technical sense, but are dealing with the language of a statute prepared by a legislature which is presumed, at least, to have knowledge of the law, and, when it enacts a new statute, to use the words which it adopts in their technical and legal sense as distinguished from their popular sense. To hold otherwise would be to subject every statutory provision to a construction not based upon the law as it existed at the time the statute was

adopted, but upon what the Court or a jury might think was the popular meaning of the words used in the minds of the legislators who used them. Any such method of construction would work havoc with the science of the law. There would be no reason why one Court or one jury considering one case should not form an entirely different idea of the popular meaning of the language of the statute from that which was formed by another Court or jury in some other case involving precisely the same principle. The only possible safe method of construction of a solemn statute is to consider, not the intent of the legislators, but the meaning of the language they used; and when they use language which has been the subject of construction by the Courts, the familiar presumption arises that they used that language in the sense in which the Courts have defined it.

In the Court below—and we have no doubt again in the brief which will be filed here—the learned counsel for the defendant referred to numerous decisions of the State Courts upon statutes by those States. enacted. We do not propose to follow them in such discussion. The cases in general turned upon the language of the special statute involved. We are here concerned with the construction of a Federal Statute. The construction of such a statute is governed by the decisions of the Federal Courts of last resort. It is to these decisions, therefore, that we must turn for light upon the meaning of the present statute.

We will state our contentions under three heads:—

**I. All the property owned by the plaintiff in her own right, as to which the tax assessed in this case was levied, being intangible personal property, is not normally liable to taxation in the United States.**

**II. Intangible personal property has its situs at the domicile of the owner and, in the absence of special statutory provisions, is not subject to taxation elsewhere.**

**III. The statute of October 3d, 1913, does not by its terms affect the situs of intangible personal property.**

I. ALL THE PROPERTY OWNED BY THE PLAINTIFF IN HER OWN RIGHT, AS TO WHICH THE TAX ASSESSED IN THIS CASE WAS LEVIED, BEING INTANGIBLE PERSONAL PROPERTY, IS NOT NORMALLY LIABLE TO TAXATION IN THE UNITED STATES.

The property of the plaintiff, the tax on which she seeks to recover in this case, consists, as above stated, of stocks of American corporations, bonds of such corporations, and individual bonds secured by mortgages upon real estate situate in the United States, all of which are owned by her in her own right.

We maintain that as to this property the rule stated by this Court in

*Kirtland vs. Hotchkiss*, 100 U. S. 491, applies.

There the question was whether a citizen residing in one State was subject to taxation in that State with respect to a bond owned by her and secured by mortgage upon realty in another State.

This Court said (page 498):—

“That debt, although a species of intangible property, may for purpose of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond wherever actually held or deposited is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt for the purposes of taxation affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but security for the debt, and, as held in *State Tax on Foreign Held Bonds* (15 Wallace 300), the right of the creditor to proceed against the property mortgaged upon a given contingency to enforce

“by its sale the payment of his demand \* \* \*  
 “has no locality independent of the party in whom it  
 “resides. It may undoubtedly be taxed by the State  
 “‘when held by a resident therein.’ \* \* \* The  
 “debt then having its *situs* at the creditor’s residence,  
 “both he and it are, for the purpose of taxation, within  
 “the jurisdiction of the State” which had assessed the  
 tax complained of.

What was there said by this Court with respect to bonds and mortgages is equally applicable to certificates for shares of stock and to corporate bonds and mortgages. In each case the paper writings held by the owner are merely evidence of his interest in the corporate enterprise or of the indebtedness of the corporation to him, and, as has been frequently pointed out by the Courts, if either were destroyed his interest and the obligation of the corporation to him would remain unchanged. Obviously, therefore, the mere fact that the certificates and corporate bonds or other papers are physically lodged in this jurisdiction solely for the owner’s convenience, does not affect their actual *situs* for purposes of taxation.

We do not, of course, dispute that the State authorizing the existence of a corporation, or the creation by it of obligations of any sort, or permitting it to do business within its borders, may do this upon condition that a tax shall be paid to it with respect to such a corporation, or to the business it does in that State, or to the profits of the business, whether in the hands of the corporation or, when dividends are declared, before they reach the hands of the stockholders; nor that such a tax can be imposed regardless of the domicile of the owner of the shares of stock of the corporation. This has been ruled in many cases:—

Corry *vs.* Baltimore, 196 U. S. 466 (1905);  
 Van Allen *vs.* Assessors, 70 U. S. 573 (1865);  
 Metropolitan Life Ins. Co. *vs.* City of New Orleans,  
 205 U. S. 395 (1907);  
 Liverpool etc. Ins. Co. *vs.* New Orleans Assessors,  
 221 U. S. 346 (1911).

In all these cases, and in many more which might be cited to the same effect, it will be found that the statute of the State which was attacked as unconstitutional, specifically imposed the tax complained of in unequivocal language, so as to eliminate the application of the general rule *mobilia sequuntur personam*; and that in the case of corporations the payment of the tax was a condition precedent to their doing business in the State.

Nothing of the sort exists under the evidence in the present case. None of the securities held by the plaintiff in her own right is issued subject to any such requirement under the laws of the United States, unless that requirement is contained in the statute in question here. That it is not so contained will be shown under our third head. Her securities are either promises to pay money or evidences of her interests in some corporation as stockholder.

## II. INTANGIBLE PERSONAL PROPERTY HAS ITS SITUS AT THE DOMICILE OF THE OWNER AND, IN THE ABSENCE OF SPECIAL STATUTORY PROVISIONS, IS NOT SUBJECT TO TAXATION ELSEWHERE.

Since the case of *McCulloch vs. Maryland*, 4 Wheaton 316, 429, it has been recognized that the power of taxation residing in a State is measured by the extent of the sovereignty which that State possesses.

In the leading case of *Cleveland etc. R. R. Co. vs. Commonwealth of Pennsylvania*, commonly cited as *State Tax on Foreign Held Bonds*, 15 Wallace 300, this Court held that the power of taxation of a State is limited to persons, property and business within her jurisdiction and that all taxation must relate to one of these subjects; that bonds issued by a Railroad Company were property in the hands of the holders and when held by non-residents of the State in which the company was incorporated, were property beyond the jurisdiction of that State; and finally, that—

“the tax laws of a State can have no extra territorial operation; nor can any law of the State incon-

“sistent with the terms of a contract made with or payable to parties out of the State, have any effect upon the contract while it is in the hands of such parties or other non-residents of the State.”

In that case the Commonwealth of Pennsylvania sought to tax bonds issued by a corporation of Pennsylvania in the hands of persons not resident within that Commonwealth, and this Court in an elaborate opinion by Mr. Justice Field, reversing the decision of the Supreme Court of Pennsylvania, held that such tax could not be assessed with respect to such foreign held bonds.

In that case Mr. Justice Field, after commenting on a prior decision of this Court in the case of *Railroad Co. vs. Jackson*, 7 Wallace 262 (1868), said (page 319) :—

“The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.

“The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures and in transportation. Unless restrained by provis-

"ions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

"Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement.

"The bonds issued by the Railroad Company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the Treasurer of the Company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. \* \* \* It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution levied upon property held in other States, where it is subjected, or may be subjected, to taxation upon an estimate of its full value."

The learned Justice then analyzed the decision of the Supreme Court of Pennsylvania in *Maltby vs. Reading & Columbia R. R. Co.*, 52 Pa. 140 (1866), saying (page 322) :—

“The amount of all which is this: that the State  
 “which creates and protects a corporation ought to  
 “have the right to tax the loans negotiated by it, though  
 “taken and held by non-residents, a proposition which  
 “it is unnecessary to controvert. The legality of a tax  
 “of that kind would not be questioned if in the charter  
 “of the company the imposition of the tax were au-  
 “thorized, and in the bonds of the company, or its cer-  
 “tificates of loan, the liability of the loan to taxation  
 “were stated. The tax in that case would be in the  
 “nature of a license tax for negotiating the loan, for  
 “in whatever manner made payable it would ultimately  
 “fall on the company as a condition of effecting the  
 “loan, and parties contracting with the company would  
 “provide for it by proper stipulations. But there is  
 “nothing in the observations of the Court, nor is there  
 “anything in the opinion, which shows that the bond of  
 “the non-resident was property in the State or that the  
 “non-resident had any property in the State which was  
 “subject to taxation within the principles laid down by  
 “the Court itself, which we have cited.

“The property mortgaged belonged entirely to the  
 “company, and so far as it was situated in Pennsyl-  
 “vania was taxable there. If taxation is the correla-  
 “tive of protection, the taxes which it there paid were  
 “the correlative for the protection which it there re-  
 “ceived. And neither the taxation of the property, nor  
 “its protection, was augmented or diminished by the  
 “fact that the corporation was in debt or free from  
 “debt. The property in no sense belonged to the non-  
 “resident bondholder or to the mortgagee of the com-  
 “pany. The mortgage transferred no title; it created  
 “only a lien upon the property. Though in form a  
 “conveyance, it was both at law and in equity a mere

"security for the debt. That such is the nature of a mortgage in Pennsylvania has been frequently ruled "by her highest Court." (Citing cases) \* \* \*

"Such being the character of a mortgage in Pennsylvania, it cannot be said, as was justly observed by "counsel, that the non-resident holder and owner of a "bond secured by a mortgage in that State owns any "real estate there. A mortgage being there a mere "chase in action, it only confers upon the holder, or "the party for whose benefit the mortgage is given, "a right to proceed against the property mortgaged, "upon a given contingency, to enforce, by its sale, the "payment of his demand. This right has no locality "independent of the party in whom it resides. It may "undoubtedly be taxed by the State when held by a "resident therein, but when held by a non-resident it "is as much beyond the jurisdiction of the State as "the person of the owner.

"It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property consisting of bonds, mortgaged, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners. \* \* \*

"We are clear that the tax cannot be sustained; that "the bonds, being held by non-residents of the State,

“are only property in their hands, and that they are  
 “thus beyond the jurisdiction of the taxing power of  
 “the State. Even where the bonds are held by resi-  
 “dents of the State the retention by the company of a  
 “portion of the stipulated interest can only be sustained  
 “as a mode of collecting a tax upon that species of  
 “property in the State. When the property is out of  
 “the State there can then be no tax upon it for which  
 “the interest can be retained. The tax laws of Penn-  
 “sylvania can have no extra-territorial operation; nor  
 “can any law of that State inconsistent with the terms  
 “of a contract, made with or payable to parties out of  
 “the State, have any effect upon the contract whilst it  
 “is in the hands of such parties or other non-residents.”

This case has been repeatedly cited with approval and followed by this Court.

In *Tappan vs. Merchants National Bank*, 19 Wallace 490 (1873) where the question was the taxability of shares of capital stock of a National bank under a statute of Illinois, the rule was thus tersely stated by the Chief Justice (page 499):—

“The power of taxation by any State is limited to  
 “persons, property, or business within its jurisdiction.  
 “Personal property, in the absence of any law to the  
 “contrary, follows the person of the owner, and has  
 “its *situs* at his domicile. But, for the purposes of  
 “taxation, it may be separated from him, and he may  
 “be taxed on its account at the place where it is actually  
 “located. These are familiar principles, and have been  
 “often acted upon in this Court and in the Courts of  
 “Illinois. If the State has actual jurisdiction of the  
 “person of the owner, it operates directly upon him.  
 “If he is absent, and it has jurisdiction of his prop-  
 “erty, it operates upon him through his property.

“Shares of stock in National banks are personal  
 “property. They are made so in express terms by the  
 “Act of Congress under which such banks are organ-

"ized. They are a species of personal property which  
 "is, in one sense, intangible and incorporeal, but the  
 "law which creates them may separate them from the  
 "person of their owner for the purposes of taxation,  
 "and give them a *situs* of their own."

It will be observed that in each of these cases this Court was dealing with intangible personal property—in one case the stock and in the other case the bonds of a corporation.

The converse of this rule with respect to tangible personal property was affirmed in

Union Refrigerator Transit Co. *vs.* Kentucky, 199  
 U. S. 194,

where it was held that a corporation was not subject to taxation in the State by which it was created with respect to cars owned by it which were permanently employed outside the State in which it was domiciled. Referring to intangible personal property, such as that involved in the present case, this Court, speaking by Mr. Justice Brown, said (page 205):—

"Respecting this, there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs*, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such has been repeated rulings of this Court. *Tappan vs. Merchants' National Bank*, 19 Wall. 490; *Kirtland vs. Hotchkiss*, 100 U. S. 491;

"Bonaparte *vs.* Tax Court, 104, U. S. 592; Sturges *vs.* Carter, 114 U. S. 511; Kidd *vs.* Alabama, 188 U. S. 730; Blackstone *vs.* Miller, 188 U. S. 189."

In the case of Provident Savings Association *vs.* Kentucky, 239 U. S. 103 (1915), where an insurance company which had been doing business in Kentucky withdrew from that State, but still continued to collect from its central office outside of that State premiums which it had previously written on the lives of citizens of Kentucky, it was held that it was not subject to taxation by Kentucky with respect to the premiums so collected. The right of recovery from its policy holders of premiums of insurance in that case is not distinguishable in its nature from the right of the plaintiff to recover from her agent in the present case the net income of her estate or from those indebted to her the interest on their obligations; and we submit that the same principle should, therefore, be applied.

In the case of Fidelity & Columbia Trust Co. Executors *vs.* Louisville, 245 U. S. 54 (1917), this Court applied the rule of *mobilia sequuntur personam* to the case of a bank deposit, holding that moneys earned in a Missouri business and deposited in a Missouri bank were subject to taxation in Kentucky because the owner of the business resided there.

Very many more cases might be cited from the decisions of this Court; but those to which we have referred are, we think, sufficient.

The learned Judge in the District Court refers, in support of his conclusion, to certain cases in addition to those above mentioned. One of these is Pullman's Palace Car Co. *vs.* Pennsylvania, 141 U. S. 18 (1891). In that case a tax imposed by the Commonwealth of Pennsylvania upon a foreign corporation doing business in Pennsylvania, measured by the proportion which the number of miles its cars were operated in Pennsylvania bore to the total number of miles of the operation of all its cars, was held valid over a strong dissent by Mr. Justice Bradley. Here it will

be observed that the tax was measured with respect to tangible personal property being used within the limits of the taxing State.

Buck *vs.* Beach, 206 U. S. 392 (1907), decided that promissory notes owned by a resident of Ohio, which were deposited by him for safe keeping in the State of Indiana were not subject to taxation there. This Court in its opinion cited most of the cases bearing upon the subject decided prior to that date. The point decided is thus stated in the syllabus:—

“The old rule of *mobilia sequuntur personam* has “been modified so that the owner of personal property “may be taxed on its account at its *situs* although “not his residence, or domicile; but the mere presence “of notes within a State which is not the residence “or domicile of the owner does [not] bring the debts of “which they are the written evidence within the taxing “jurisdiction of that State, and a tax thereon by that “State is illegal and void under the due process clause “of the Fourteenth Amendment.”

The cases of *In re* San Antonio Land & Irrigation Co., 228 Fed. 984 (1916), and *In re* Berthoud, 231 Fed. 529 (1916), were bankruptcy cases arising in New York.

In the first case the learned Judge stated in rather general language that bankruptcy is a sort of equitable attachment analogous to taxation and that, therefore, bonds pledged to a corporation in the State constituted property in that district sufficient to give jurisdiction in bankruptcy cases. He stated that he followed *Simpson vs. Jersey City Contracting Co.*, 165 N. Y. 193. In the *Berthoud* Case the same principle was applied in a case of an alien's bank deposit in New York.

We submit that the real underlying reason for all such decisions is that, by pledging his securities or depositing his money in a particular way, with the intent to give another an interest in, or control for the latter's benefit over, his securities or moneys, the debtor has evidenced his

intention to separate the *situs* of his securities or of his moneys from his own domicile. It follows that he is estopped to deny the existence of the new *situs* for such property, distinct from his own domicile, where any difference exists between the two. No such presumption arises when no such outside interest exists; as when one leaves one's papers with one's own agent solely for one's own benefit.

We are unable to see what relation the case of *Lynch v. Turrish*, 236 Fed. 653 (1916), also cited by the learned Judge, has to the present issue.

III. THE STATUTE OF OCTOBER 3D, 1913, DOES NOT BY ITS TERMS AFFECT THE *situs* OF INTANGIBLE PERSONAL PROPERTY.

As we have already pointed out, the only language of the statute of October 3d, 1913, applicable to the present case is the requirement that

"there shall be levied, assessed, collected and paid annually \* \* \* a tax of one per centum per annum \* \* \* upon the entire net income from all property owned \* \* \* in the United States by persons residing elsewhere."

There are no special words in this statute which, as in the cases above cited, indicate the intent of the legislature to reach any particular classes of property. It would follow, therefore, that the words "property owned in the United States" should be taken in their ordinary legal meaning, and that they should not be extended to include intangible property owned by an alien not resident in the United States, because such intangible personal property under the general rule we have above quoted, has for its *situs* the domicile of that alien non-resident.

We have been unable to find any decision of the Federal Courts in any other case under this statute which affects the present issue. We are not, however, without authority—and that of the highest character. Immediately upon the

passage of the Act of October 3d, 1913, the question of its scope had to be considered by the Treasury Department, and on October 16th, 1913, this question was formally referred to the Attorney General of the United States (now an honored member of this Court) for an opinion. He replied as follows on October 23d, 1913 (30 Op. Att. Gen. 230, advance sheets):—

“Sir: I have the honor to reply to your letter of October 16th, wherein you ask concerning the application which you should give to the language quoted below from Section II, Paragraph A, sub-division 1, of the tariff law of October 3d, 1913:—

“That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned, and of every business, trade, or profession carried on in the United States by persons residing elsewhere.”

“In substance, you wish to be advised whether, in pursuance of this paragraph, the regulations which you are about to promulgate should direct the levying, assessing, and collecting of a tax upon the interest accruing upon bonds executed by a resident or citizen of the United States, whether secured by a mortgage or no, when such bonds are held or owned by a citizen or resident of a foreign country. Also, whether this tax should be levied upon the interest thereon where bonds executed by a non-resident foreigner, and secured by a mortgage on real estate in the United States, are held and owned by another non-resident foreigner.

"I am of opinion that the quoted provision does not lay a tax upon the interest accruing on bonds of the character specified when held and owned by a non-resident foreigner, and that this is true irrespective of whether they are unsecured or secured by a mortgage upon real estate in this country, and also irrespective of where the written bonds are in fact kept or interest payments thereon are made.

Respectfully,

J. C. McREYNOLDS.

*"To the Secretary of the Treasury."*

Again, on July 15th, 1914 (30 Opp. Att. Gen. 273 Advance Sheets) in reply to an inquiry whether the corporate dividends accruing to non-resident aliens were subject to the income tax, he expressed the opinion, based upon a careful consideration of the authorities, that such dividends were not subject to the tax.

In this case the Secretary of the Treasury submitted to the Attorney General the question:—

"Whether, under the provisions of the Act imposing an income tax, dividends of corporations accruing to non-resident aliens are subject to the normal or the additional tax, or both, and whether for the purposes of the normal tax, they should be withheld at the source by the corporation or by the agent of said alien non-resident stockholders receiving them for transmission out of the country to said owners."

The Attorney General, after quoting the statute as above said:—

"In my opinion, the mere receipt of dividends and income from domestic corporate stock by a non-resident alien, is not a 'business trade, or profession carried on in the United States.' See *McCoach vs. Minehill Railroad Co.* (1913), 228 U. S. 295.

"Your question is, therefore, in substance: Are

"shares of domestic corporate stock owned by non-resident aliens 'property \* \* \* in the United States' within the meaning of the above statute.

"The fact that the property and its *situs*, in relation to the taxing power, have been frequent subjects of judicial interpretation by Federal and State Courts, must be given weight in construing the intention of Congress in using the words above quoted. In *Covington vs. First National Bank of Covington* (1905), 108 U. S. 100, 111, it had been held:—

"The *situs* of shares of foreign-held stock in an incorporated company, in the absence of legislation imposing a duty upon the company to return the stock within the State as the agent of the owner is at the domicile of the owner. *Cooley on Taxation*, 16.'

"A similar statement of the law is found in *Hawley vs. Malden* (1914) 232 U. S. 1, 11, 12 (decided in January, 1914, within three months, after the passage of the Income Tax Law):—

"While the shareholder's rights are those of a member of the corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights, or *choses in action*. *Morawetz on Corporation*, Sec. 225. As such in the absence of legislation prescribing a different rule, they are appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to contribute to the support of the Government whose protection he enjoys.'

"The Courts, having thus defined the *situs* of corporate stock for purposes of taxation, and a tax upon income being a direct property tax, *Pollock vs. Farmers Land & Trust Co.*, 158 U. S. 601 (the sixteenth amendment merely enlarging the powers of the United States, without changing the legal nature of the tax) it follows that Congress must be deemed to have used

"the words 'property \* \* \* in the United States' as including only such forms of property as had a legal *situs* therein. I find in this statute no enactment taxing income from corporate stock in specific terms and no appropriate language evincing any intent to fix by legislation the *situs* of such stock.

"The intention of Congress to impose a tax must be expressed in 'clear and unambiguous' language. *United States vs. Isham* (1873), 17 Wall. 496, 504; *Eidman vs. Martinez* (1902), 184 U. S. 578, 583; *Benziger vs. United States* (1904), 192 U. S. 38, 55; *Spreckels Sugar Refining Co. vs. McClain* (1904), 192 U. S. 397, 416; 23 Op. 62.

"In my opinion, therefore, shares of stock of domestic corporations owned by non-resident aliens are not 'property \* \* \* in the United States' within the meaning of the Act of October 3d, 1913, and dividends accruing therefrom to such non-resident aliens are not subject to any tax under said act.

"This opinion is confined to a construction of the legal import and intent of the statute in question; and I express no opinion whatever as to the power of Congress, by appropriate legislation, to impose such a tax.

"Respectfully,

"J. C. McREYNOLDS.

"*To the Secretary of the Treasury.*"

This Court put the stamp of its approval on the views thus expressed in the case of

*Gould vs. Gould*, 245 U. S. 151 (1917), where the question was whether alimony paid to a divorced wife was "income" taxable in her hands within the meaning of the same Revenue Act of 1913 under consideration here.

This Court held that it was not; and as the basis for this decision laid down as the general rule for the interpretation of taxing statutes in the Federal Courts exactly the opposite of that adopted by the District Judge below, saying (page 153):—

"In the interpretation of statutes levying taxes it is "the established rule not to extend their provisions, by "implication, beyond the clear import of the language "used, or to enlarge their operations so as to embrace "matters not specifically pointed out. In case of doubt "they are construed most strongly against the Govern- "ment, and in favor of the citizen. *United States vs. "Wigglesworth*, 2 Story 309; *American Net and Twine "Co. vs. Worthington*, 141 U. S. 468, 474; *Benziger vs. "United States*, 192 U. S. 38, 55."

This construction was at first followed by the Commissioner of Internal Revenue in his instructions to the various collectors. Thus in those of August 12th, 1914 (16 Treasury Decisions Internal Revenue 118), and December 28th 1914 (*Ibid.* 305), his direction as to returns were carefully limited to the case of *non-resident aliens carrying on a trade or profession in the United States*. It is now, however, contended that these opinions of the Attorney General and of this Court were erroneous; upon what ground, we are unable to discover.

The taxing authorities, however, while now maintaining the opposite view, do not appear to have had sufficient confidence in it to adopt the same language in the subsequent Revenue Acts. In that of September 8th, 1916 (39 U. S. Stats. 756), the tax is by Section 1 levied—

"upon the entire net income received in the preceding "calendar year from all sources within the United "States by every individual, a non-resident alien, in- "cluding interest on bonds, notes, or other interest bear- "ing obligations of residents, corporate or otherwise."

And in the Revenue Act of 1918 ( U. S. Stats. ), Section 213 (c) it is provided that:—

"In the case of non-resident alien individuals, gross "income includes only the gross income from sources "within the United States including interest on bonds,

"notes or other interest bearing obligations of residents, "corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods "or otherwise) representing profits on the manufacture and disposition of goods within the United "States."

Reference has been made in some quarters to the decision of this Court in the case of *Brushaber vs. Union Pacific R. R. Co.*, 240 U. S. 1, which was claimed to be the basis of a new Treasury Decision promulgated subsequently to those above mentioned and numbered 2313. An examination of this case, however, will disclose that the question there raised was not at all the scope of the Act or what classes of persons or property were thereby subjected to tax; but wholly whether or not the Act was constitutional under the Sixteenth Amendment. This appears not only in the syllabus, but in the opinion. That the Act is constitutional does not in the least affect the question what persons or property are taxed thereby. That is the question involved in the present case, and we are content to rest our claim upon the plain language of the Act and the opinion of the Attorney General.

It is proper, however, to suggest to the Court certain considerations which should have weight, if it should be thought necessary to determine what was the intent of Congress in passing the Act.

The plaintiff is a citizen and a resident of a foreign State and is, as such, dependent upon it for protection, and subject to taxation there upon her entire personal property. To subject her to a second tax in this country on the intangible personal property against which the present levy is directed, whether that property consists of loans made to individuals or corporations here, or shares of stock of such corporations, would be to impose upon her with respect to such property, a double taxation. It is a well

established rule that this is never to be presumed to be the intention of the Legislature.

There is ample scope for giving proper effect to the Act in question without so extending its words as to create such double taxation. The *situs* of tangible personal property, as is abundantly illustrated in the cases which we have cited, is separable from the domicile of the owner, so that such property may be taxed here, although the owner's domicile is elsewhere. Real estate is generally taxed at its *situs*, regardless of the domicile of the owner. When, therefore, Congress undertook to impose a tax upon "all property owned \* \* \* in the United States by "persons residing elsewhere," and at the same time used no language to indicate that it intended to reach intangible personal property, the only fair conclusion is that the tax was intended to cover that sort of property which is ordinarily designated by such general words, namely: real estate and tangible personal property.

The Congress when it desired to go further plainly indicated that desire. When dealing with citizens of the United States it provided for assessing a tax upon the entire net income arising or accruing from all sources. When dealing with non-residents it imposed a tax "upon "the entire net income \* \* \* of every business, trade "or profession carried on in the United States by persons "residing elsewhere;" but it stopped at that point. When, in later acts it determined to go further, it had no difficulty, as above pointed out, in expressing its intent in clear and unmistakable language.

We submit that in a statute, and especially in a taxing statute, there is no presumption that the field to be covered extends beyond the plain language of the enactment, viewed in the light of prior judicial decisions.

The Act as drawn covers, as we have pointed out, directly and in unmistakable language, a large field as to which its validity is undoubted. There is no reason to extend by construction its scope to a field over which, by a long line of decisions of this Court, the right to tax has been ex-

cluded; especially in a case where manifest inequality and injustice would result.

Our contentions, therefore, may be thus summarized:—

At the time the statute of October 3d, 1913, was passed, this Court had decided:—

*First.*—That real estate was taxable at its *situs*, regardless of the domicile of the owner;

*Second.*—That tangible personal property was taxable where found and not necessarily at the domicile of the owner; and

*Third.*—That intangible personal property, such as mortgages, etc., was subject to taxation, in the absence of a special statute to the contrary, only by the State of the domicile of the owner.

The general principle which forms the basis for all these decisions was that the power to tax is co-extensive with the right and duty of the Government to protect, and “that the power of the United States to tax is limited to “persons, property and business within their jurisdiction “as much as that of a State is limited to the same subjects within its jurisdiction.” (U. S. *vs.* Erie R. R. Co., 106 U. S. 333.)

Congress, having, presumably, knowledge of the law as it stood when the Act was passed, and being desirous to extend the income tax to all property within its jurisdiction, provided:—

*First.*—For the taxation of the income of a citizen no matter where he resides, because its protection extends to him everywhere;

*Second.*—For the taxation of the income of an alien resident in the United States with respect to his property, and also of an alien non-resident with respect to his business, trade or profession carried on within the United States, because while so resident, or with respect to such business, trade or profession, he was within the protection and jurisdiction of the United States; and

*Third.*—For the taxation of the income of so much of the property of aliens residing elsewhere as was owned by

them in the United States, using apt language to cover all that this Court had said could be reached by the United States, viz: real estate and tangible personal property in the United States.

There is nothing in the Act to show any intention of Congress to extend this tax to any other class of property. As is conceded by the learned Judge in the Court below, the Act, "read in the light of critical accuracy, does not "tax the property on which this tax was levied." But taxing statutes only extend to matters which they cover "in "clear and unambiguous language." The present Act, therefore, cannot be held to cover intangible personal property owned by non-resident aliens.

An alien residing abroad and having made loans to citizens or corporations within the United States or having become entitled by virtue of ownership of shares of stock, to a share in the profits of a corporation doing business in the United States, nevertheless does not, under the decisions, own such intangible personal property in the United States, no matter where the certificates or bonds or other evidences of indebtedness may be deposited. His ultimate recourse for the protection of his rights, is not to the Government or to the laws of the United States as such, but to his own Government and to the safeguards which it has, by treaty or otherwise, secured from the United States for its citizens with respect to such property. The alien, therefore, owns such property in the place of his domicile and not in the United States, so that income derived from such sources is not within the scope of the statute.

The plaintiff is claiming not an exemption from the incidence of a tax with respect to the income from the property in dispute; but that such property was not within the purview of the statute at all.

We submit, therefore, that the question here certified by the Circuit Court of the United States for the Third Circuit should be answered in the negative.

JAMES WILSON BAYARD,  
*For Plaintiff.*



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# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

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EMILY R. DE GANAY	} No. 319.
v.	
EPHRAIM LEDERER, COLLECTOR.	

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*ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE THIRD CIRCUIT.*

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**BRIEF ON BEHALF OF THE DEFENDANT.**

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## **STATEMENT OF THE CASE.**

Emily R. de Ganay brought an action against the Collector of Internal Revenue to recover taxes assessed upon her under the Income Tax Act of October 3, 1913, and paid by her under protest.

At the time the tax was assessed, she was not a citizen of the United States, or resident therein. She owned certain property, or, to avoid any confusion in the definition of terms, she owned certain rights, the exercise of which enabled her to derive advantages measured in money. These rights were evidenced by stocks and bonds of corporations organized under the laws of the United States—domestic corporations—and by bonds (presumably of individuals domiciled in

the United States) secured by mortgages on lands situated in the United States. Her interests in these rights or securities were in the hands of a resident agent, which had physical possession of the writings evidencing them and which was, in effect and for the present purpose, her *alter ego*, having full power to do whatever she could do in regard to these rights to the end that they should return to her as large a service or income as proper management could secure.

The Income Tax Act of October 3, 1913, did not purport to tax persons like the plaintiff (alien non-residents) except in respect of net income arising or accruing to them from "all property owned and of every business, trade, or profession carried on in the United States" by such persons. As the plaintiff did not derive her income from a business, trade, or profession carried on by her in the United States, the only question was whether her income arose or accrued to her from property owned by her in the United States.

The District Court held that it did (239 Fed. 568). The Court of Appeals, being in doubt, certified the following question to this Court:

If an alien nonresident owns stocks, bonds and mortgages secured upon property in the United States or payable by persons or corporations there domiciled; and if the income therefrom is collected for and remitted to such nonresident by an agent domiciled in the United States; and if the agent has physical possession of the certificates of stock, the bonds

and the mortgages; is such income subject to an income tax under the Act of October 3rd, 1913?

**THE STATUTE.**

The material portions of the Act of October 3, 1913, are as follows:

A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere. \* \* \*

B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or

profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent:  
\* \* \*

The net income from property owned and business carried on in the United States by persons residing elsewhere shall be computed upon the basis prescribed in this paragraph and that part of paragraph G of this section relating to the computation of the net income of corporations, joint-stock and insurance companies, organized, created, or existing under the laws of foreign countries, in so far as applicable. \* \* \*

\* \* \* On or before the first day of March \* \* \* a true and accurate return \* \* \* shall be made by each person \* \* \* subject to the tax imposed by this section \* \* \* to the collector of internal revenue for the district in which such person resides or has his principal place of business, or, in the case of a person residing in a foreign country, in the place where his principal business is carried on within the United States \* \* \*; guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals: \* \* \*

**THE QUESTION INVOLVED.**

No contention is made by the plaintiff that Congress did not have power under the Constitution to tax the income accruing to the plaintiff, as owner, from the rights referred to. The only question in the case, therefore, is one of construction, i. e., whether Congress intended by the words "property owned in the United States by persons residing elsewhere" (taken in connection with the general scheme of the Act), to cover such rights as those from which the plaintiff admittedly derived an income.

**ARGUMENT.****THE PLAINTIFF'S INCOME ACCRUED FROM PROPERTY OWNED IN THE UNITED STATES.****I.****This is Clear as a Matter of Reason.****A. The Nature of Plaintiff's Rights.**

The record describes these rights as represented by promissory notes and bonds of persons (corporations being persons for this purpose), resident or domiciled in this country and by shares of stock of American corporations.

To the extent that these rights were secured by mortgages on lands in this country, a situation favorable to the United States might arise (under the decision of this Court in *Savings Society v. Multnomah County*, 169 U. S. 421). But in order to reduce our claim to its lowest terms we shall, for simplicity, deal

with the matter as involving merely rights on the part of an alien nonresident against a person domiciled in this country. It is, however, not to be overlooked that all of plaintiff's rights were in effect exercised by her through a local agent, and that her connection with those rights was, for all practical or legal purposes, reduced to the mere receipt by her in a foreign country of the product of the services or advantages rendered by her debtors in this country under the supervision of her local agent. In other words, if any doubt should arise as to whether the plaintiff's rights were "property" at all, or, if they were, whether they could be said to be "in the United States," the fact that they were dealt with by the plaintiff herself as having the aspect of "affairs," or "business," or "investments" in this country, in which she had a proprietary interest, is important.

Since the argument here addressed to the Court by the plaintiff turns very largely upon a supposed distinction between real estate and tangible personal property on the one hand and intangible personal property upon the other with respect to the presumptions with which the Court should approach the construction of the statute (Brief, 26), it is worth while to analyze with some care the essential nature of the rights of the plaintiff which have been described. It follows from what has been said that plaintiff's rights were to demand that certain persons resident in this country should so employ their services in connection with elements and instrumentalities of wealth as to produce and to remit to her from time

to time a part of the proceeds thereof. The designation of the persons and the details of the transaction were subject to the choice of a person resident in the United States, acting as plaintiff's agent and exercising in her behalf authority in this country. Her rights related to the use of property which is a part of the national wealth of the United States and which, in its existence and utilization received the protection of its national functions and authority. The rights themselves depended for their existence, their protection, and their enforcement upon the exercise of the sovereignty of the United States where courts and processes were open to the plaintiff. Nothing went from this country except the income translated into money—the satisfaction of the obligation which, until satisfied, belonged to the plaintiff. That the income, as such, if the product of "property owned in the United States" is taxable and was taxed is not disputed by the plaintiff.

#### **B. Plaintiff's Rights were "Property."**

The rights owned by the plaintiff, so described and analyzed, were obviously "property," both in a strict legal sense as well as in the vernacular. Authorities which later are reviewed fully demonstrate this, if demonstration be needed. Congress must therefore have intended to include them in its reference to property owned by alien nonresidents.

It may be said in passing that while "property" is sometimes used in common speech to describe a physical object, the thing itself has no standing either in

the eye of the law or of ordinary business usage. What is significant both for legal and practical purposes is the right to user and to domination; those rights which can be exercised over things without interference and with advantage to the owner. It is these which are important in law and commerce.

**C. They were "Owned in the United States."**

It being entirely clear that plaintiff was the owner of "property," from which she derived income, the question remains whether this "property" was "owned in the United States" within the meaning of the statute.

On the one hand, the Act clearly intended to cover to some extent the income of alien nonresidents; on the other, it did not intend to cover all income derived by such persons from every source. The line was drawn and fixed by reference to the character of the source from which the income was derived. If that source was of the character of "property" (that is, rights to the user of wealth), and was situated in this country, the income was taxed. The case at bar seems to fall directly within the statute. The source of the plaintiff's income was "property" (being her rights, evidenced by notes and bonds and certificates of corporate stock, themselves physically here, to the user or service of certain wealth), and such source was in this country, since it was here that the rights were exercised so as to produce her income.

The claim of plaintiff is that there is an entire distinction between those property rights which are

concerned with the user of land and chattels (tangible things) and those property rights concerned with the user of choses in action (intangible things); that as to the latter, their *situs* is, generally speaking, at the domicile of the owner, creditor, or obligee, in accordance with the maxim *mobilia sequuntur personam*; that if, therefore, Congress intends to separate such *situs* from the owner's domicile and fix it elsewhere, for instance at the obligor's domicile, it must use specific language to that effect, as e. g. "property including choses in action and incorporeal rights, the obligors in which reside in the United States."

This, however, is to put too narrow a meaning on the words "property owned in the United States," both generally and as used in the Act of October 3, 1913. In so far as the maxim *mobilia sequuntur personam* is concerned, it is now settled that it is a mere fiction which will not be permitted to obscure the actual situation. As an actual fact, "property" at the present day more often means rights to the user of choses in action than rights to the user of land or chattels. In other words, partial rights to the user of wealth, such as are evidenced by stocks, bonds, notes, bills of exchange, policies of insurance, etc., etc., are more numerous and of greater importance than rights of absolute ownership in lands or chattels. In ordinary speech they are referred to as "property," and there is no reason to suppose that Congress did not refer to them as such.

Moreover, Congress itself, in Division B of Section 2 of the Act of October 3, 1913, specified the sources from which "income," as within the Act, was derived, and expressly provided that the "income" of alien nonresidents should be computed on that basis, in so far, of course, as consistent with the basis fixed in Division A. That is, in so far as the sources specified in B could be said with legal propriety to be "property owned in the United States," they must be taken into account in computing the income of an alien nonresident. Such sources are, as specified in the Act, "sales, or dealings in property, whether real or personal, growing out of the ownership or use of, or interest in real or personal property, also from interest, rent, dividends, securities."

This specific enumeration clearly includes choses in action, and Congress therefore intended that they should be included in the computation of the taxable income of an alien nonresident, *provided* they could, without violating fixed rules of law, be said to be "owned in the United States."

It is submitted that there is no legal reason why they could not. Rights to the user of land or chattels do not, on last analysis, differ from other property rights as to *situs*. As has been said above, the thing itself—the land or chattel—is of no interest to law or to political economy. Only the rights to the use of the thing, as protected and enforced by legal rules and customs, are of importance. Such rights, whether they relate to lands, to patents, to mere choses in action, have no physical *situs* in space.

The law, for the purpose of effectively enforcing them, assigns to them a *situs*, different perhaps for different purposes, as, e. g., succession, administration, attachment or garnishment, assignment, taxation. By the great weight of modern authority, however, the most natural, normal *situs* of rights for legal purposes is the place where such rights are exercised and enforced, viz, where the land or chattel is, where the corporation is organized or has its principal place of business, where the patent is registered, where the obligor has his domicile. While such is not necessarily the *situs* of rights at all times and for all purposes, it is nevertheless an admittedly recognized *situs* by modern legal terminology, and therefore may with propriety be said to be the *situs* in the mind of Congress when it used the phrase "property owned in the United States."

Furthermore, this is especially true of taxation, which must necessarily pay more attention to the best method of getting the taxes promptly, and with as little expense and machinery as possible, than to theoretical distinctions. In the case of choses in action it is much easier for the taxing authority to reach and tax the property represented through the debtor than through the creditor. This is the advantage of taxing incomes at their source. In the present case not only was the wealth, out of which the plaintiff's income in its last analysis came, in this country, but the enforcement of plaintiff's rights and the collection of said income were in the hands of a resident agent. In such a case the Act of October 3,

1913, by Division D, provided that the agent should make a return of the income of his principal "coming into his custody or control and management." Thus Congress recognized the *situs* of the jurisdiction where control over the rights could be effectively exercised as being the really important matter.

The plaintiff seems to be reduced to the following dilemma. Either Congress used the words "owned in the United States" as meaning "owned by a person resident in the United States or receiving the benefits of the exercise of his rights there," in which case the language would not apply to any proprietary rights of an alien nonresident—not even a fee simple estate in lands; or it used them in the sense "exercise of the rights of ownership in the United States," in which case it would apply to choses in action evidenced by commercial securities, as much as to rights in lands or chattels, and especially so when the management of said rights and the evidences of them were in the hands of a local agent.

## II.

**The Contention of the Government is fully supported by Authority.**

While, of course, the particular language used in this statute has not been the subject of construction by this Court, there have been many cases decided by it which have dealt with choses in action as "property" for the purposes of taxation and have discussed the *situs* of such property in its actual or

supposed relation to that power. Rather than to marshal a few of the more striking of these decisions and to quote a few salient phrases from them, it has deemed, in view of the possible far-reaching importance of the case, most helpful to state as briefly as may be the whole current of this Court's pronouncement and to let the review speak for itself. It is believed that such a review shows a steady course of development away from the doctrine of *State Tax on Foreign Held Bonds*, 15 Wall. 300, decided in 1872, to a point where the reasoning of Mr. Justice Bradley, concurring, in *United States v. Erie Railway Co.*, 106 U. S., appendix, has at last become established as the law.

In *State Tax on Foreign-held Bonds*, 15 Wall., 300, a statute of Pennsylvania required corporations doing business in the State to retain five per centum from the interest paid its bondholders and to pay it to the State. This Act was held unconstitutional in so far as it affected nonresident bondholders. The court said (pp. 319, 320):

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. \* \* \* But debts owing by corporations, like debts owing by individuals, are not *property* of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors.

With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. [*Italics ours.*]

The dissenting justices met this issue squarely and said that no constitutional provision restrained a State—

from taxing the *property* of persons which it can reach and lay its hands on, whether these persons reside within or without the State. [*Italics ours.*]

In *Kirtland v. Hotchkiss*, 100 U. S. 491, a Connecticut statute taxed all choses in action, "being the *property* of any person resident in the State." [*Italics ours.*]

Kirtland had lent money in Chicago, represented by bonds whose *locus solutionis* was Chicago. They were secured by deeds of trust on real estate in Chicago, the trustees having the ordinary full powers. This court held the Connecticut statute constitutional. It said (100 U. S., 498, 499):

The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow citizens of the same State, to contribute for the support of the government whose protection he enjoys.

That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the

domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for the purpose of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held in *State Tax on Foreign-held Bonds* (*supra*), the right of the creditor “to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand \* \* \* has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein,” &c. *Cooley on Taxation*, 15, 63, 134, 270. The debt, then, having its *situs* at the creditor’s residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government.

In *United States v. Erie Railway Company*, 106 U. S. 327, the court had under consideration Section 122 of the Act of June 30, 1864, levying a tax of five per centum upon the interest or dividends owing by any corporation to its stockholders or debtors “including nonresidents, whether citizens or

aliens," and authorizing the corporation to withhold the amount of the tax from the debt. The corporation, having paid the full amount of the interest or dividends involved, was held liable to the tax on the amount so paid. The majority of the Court, in an opinion delivered by the Chief Justice, held, following *Railroad Company v. Collector*, 100 U. S. 595, that the tax was an excise on the business of the corporation, and therefore did not involve any question of the liability of its creditors or stockholders. Justice Field dissented for the reason expressed by him in delivering the opinion of the Court in the *Tax on Foreign-held Bonds*, *supra*, viz, that the tax was upon the foreign holders and not on the corporation; that as such it was a tax on property outside the jurisdiction; and therefore unconstitutional.

As to whether the tax was on the corporation or on its stockholders as debtors, he referred to the case of *United States v. Railroad Company*, 17 Wall. 322, in which it was held as to a similar tax that it was in fact upon the shareholders or bondholders, and was therefore unconstitutional in so far as such bondholders or stockholders were the State acting through a municipal corporation.

Justice Bradley delivered an opinion, in which Justice Harlan concurred, agreeing with the decision of the majority for entirely different reasons. (106 U. S. Appendix.) He denied Justice Field's argument as to the power of Congress to tax choses in action at the domicile of the debtor, and conse-

quently agreed with the majority that the tax was validly levied. He said:

The objection that Congress had no power to tax nonresident aliens is met by the fact that the tax was not assessed against them personally, but against the *rem*, the credit, the debt due to them. *Congress has the right to tax all property within the jurisdiction of the United States*, with certain exceptions not necessary to be noted. In this case, the money due to nonresident bondholders was in the United States—in the hands of the company—before it could be transmitted to London, or other place where the bondholders resided. Whilst here it was liable to taxation. Congress, by the internal-revenue law, by way of tax, stopped a part of the money before its transmission, namely, five per cent of it. Plausible grounds for levying such a tax might be assigned. It might be said that the creditor is protected by our laws in the enjoyment of the debt; that the whole machinery of our courts and the physical power of the Government are placed at his disposal for its security and collection. [Italics ours.]

In *Savings Society v. Multnomah County*, 169 U. S. 421, the question was as to the validity of an Oregon law which taxed the equity in a mortgage, owned by a nonresident, of real estate in Oregon to the extent of the amount of the loan, if the value of the property was sufficient. The court sustained the statute, holding that the ownership or *property* in land could be divided between the mortgagor and mortgagee,

and that the interest of the mortgagee, as thus separated by the laws of the State, could lawfully be taxed by such laws as *property* within the State. In *New Orleans v. Stempel*, 175 U. S. 309, it was held that notes, mortgages, and bank deposits in the hands of a local agent of a nonresident owner could be taxed as property in the State where situated. This was followed in *Bristol v. Washington County*, 177 U. S. 133, in spite of the fact that the notes and mortgages were not kept permanently in the taxing State. In *Eidman v. Martinez*, 184 U. S. 578, the question was as to the liability to the Federal inheritance tax of certain bonds in the custody in this country of the local agent of a nonresident alien owner. While it was held that the particular statute in question did not apply, it was assumed as beyond question that the indebtedness represented by the bonds was property in this country and that the maxim, *Mobilia sequuntur personam*, did not apply. The court said (184 U. S. 589):

The tax in question in this case not being upon the property itself, but upon the succession \* \* \* laws imposing general taxes upon real and personal property are not controlling when applied to taxes upon the succession \* \* \*. *The actual situs of the property in such cases cuts but a small figure, while in the case of general taxes upon such property it is now considered determinative of the whole question.* [Italics ours.]

In *Blackstone v. Miller*, 188 U. S. 189, a statute of New York levied a tax on the transfer by will or

intestate law "*of property within the State,*" the decedent being a nonresident. This was held to cover a bank deposit and to be constitutional. The Court said (188 U. S. 205, 206):

If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay.

\* \* \* \* \*

Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The *maxim mobilia sequuntur personam* has no more truth in the one case than in the other. When logic and the policy of State conflict with a fiction due to historical tradition, the fiction must give way.

The case of *State Tax on Foreign-Held Bonds*, it was held, must be confined to bonds and negotiable instruments actually held outside the jurisdiction.

In *Corry v. Baltimore*, 196 U. S. 466, it was held that a State could lawfully fix the situs of shares of stock for taxation at the principal office of the corporation as against a nonresident owner; that is, such shares could be considered property at that place.

In *Metropolitan Life Insurance Company v. New Orleans*, 205 U. S. 395, the same statute considered in *New Orleans v. Stempel* was before the Court. The Insurance Company loaned money in Louisiana, taking notes secured by policies of insurance. These notes and policies were kept in New York except when needed in Louisiana for payment of interest or principal. It was held that these notes were part of the *capital* with which the company did business in Louisiana and taxable there.

In *Buck v. Beach*, 206 U. S. 392, it was held that the mere physical presence within the State of Indiana of promissory notes made and payable in Ohio and secured by land in that State did not make such notes property in Indiana for the purpose of taxation. The decision would presumably have been different had the notes been part of the capital of a business carried on in Indiana, or had the security been lands in Indiana and the tax limited to their value. In *Burke v. Wells*, 208 U. S. 14, it was held, on the authority of *Metropolitan Life Insurance Company*

v. *New Orleans*, supra, that deposits in bank and bills receivable owned by an alien nonresident, the proceeds of the business of an importer carried on in New York, were part of the capital invested in business in New York and carried on under the protection of the laws of that State. The principle laid down in this class of cases is summed up by Taft, J., delivering the opinion of the Court of Appeals in *Walker v. Jack*, 88 Fed. 576, 578, as follows:

Another exception [to the maxim *mobilia sequuntur personam*] is where, though the beneficial interest in the debt is owned by a non-resident, yet the money is invested, the debt is contracted, and the investment is controlled by a resident agent of the owner. In such a case it is held that the money and the credit in which it is invested are within the state, where the agent receives the money for his principal, and makes the loan, having authority to collect it and to reinvest it.

In *Selliger v. Kentucky*, 213 U. S. 200, it was held that rights in personal property situated in a foreign country were not represented by a warehouse receipt to the extent of making them taxable in the state where such receipts happened to be, although the owner carried on business in that state. The case was assimilated to *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, rather than to *New Orleans v. Stempel*, supra, and that class of cases. (See also *Southern Pacific Co. v. Kentucky*, 222 U. S. 63).

In *Liverpool, etc., Insurance Co. v. Orleans Assessors*, 221 U. S. 346, the decisions in *New Orleans v. Stempel* and kindred cases, *supra*, were applied to credits for premiums due though not evidenced by written instruments. The Court said (221 U. S. 354, 355):

The legal fiction, expressed in the maxim *mobilia sequuntur personam*, yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement. *Blackstone v. Miller*, 188 U. S. 205, 206. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the State, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power, could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there.

In *Hawley v. Malden*, 232 U. S. 1, it was held that shares of stock in foreign corporations could lawfully be taxed at the domicile of the owner. As to taxation elsewhere the court said (232 U. S. 12):

Undoubtedly the state in which a corporation is organized may provide, in creating it, for the taxation in that state of all its shares whether owned by residents or nonresidents. *Corry v. Baltimore*, 196 U. S. 466. This is by virtue of the authority of the creating State to determine the basis of organization and the liabilities of shareholders.

In *Wheeler v. New York*, 233 U. S. 434, it was held that promissory notes physically present in New York could lawfully be taxed under the Transfer Tax Act of that State as "property within the State" though the owner and makers were nonresidents. While it would seem that a majority of the Court did not agree on the ground of the decision, it is clear that if the makers of the notes had been domiciled in New York no doubt would have been felt.

In *Rogers v. Hennepin County*, 240 U. S. 184, 191, it was held that shares representing membership in a Chamber of Commerce could lawfully be taxed where the Chamber was located although the owner was a nonresident and had the shares in his possession. The court, after stating (240 U. S. 189):

It is not to be doubted \* \* \* that the memberships despite the restriction of the rules were property,

said (240 U. S. 191):

\* \* \* "It is urged that the memberships are intangible rights held by the member at his domicile. But it sufficiently appears from the allegations that the memberships represented rights and privileges which were exercised in transactions at the exchange in the City of Minneapolis, and, we are of the opinion, applying a principle which has had recognition with respect to credits in favor of nonresidents arising from business within the State, and in the case of shares of stock of domestic corporations, that it was competent for the State to fix the *situs* of the memberships for the purpose of taxation, whether they were held by residents or nonresidents, at the place within the State where the exchange was located."

In *Bullen v. Wisconsin*, 240 U. S. 625, it was held that bonds, stocks, and notes physically present in Illinois could lawfully be taxed by Wisconsin as part of an inheritance transmitted by the owner domiciled there. It was conceded, however (240 U. S. 631), that they could also be taxed in Illinois.

In *Fidelity & Columbia Trust Company v. Louisville*, 245 U. S. 54, it was held that deposits in banks in St. Louis owned by a resident of Kentucky were taxable by the latter State. It is in effect conceded, however (245 U. S. 58), that they could also be taxed in Missouri.

In *Iowa v. Slimmer*, 248 U. S. 115, it was held that notes and bonds physically present in Minnesota had a *situs* there both for inheritance tax and for probate

and administration, though the owner died a resident of Iowa.

It is not necessary to cite the decisions upon the subject in the courts of the several States, especially since they are familiar to this Court, and the most important of them are cited in its decisions. It is sufficient to say that they throw no additional light upon the subject. Since, however, the case at bar comes from Pennsylvania, it may be noted that as early as 1835 the Supreme Court of that State held in *Willing v. Perot*, 5 Rawle 264, that stock of the United States Government owned by an alien non-resident was assets in Pennsylvania for administration, and was subject to the State inheritance tax.

Since it is generally stated in the authorities that neither the Federal nor State Governments have power to tax property situated outside of their territorial limits, and since it is also held (as appears from the above abstract of the cases) that choses in action may be taxed at the domicile of the obligor, it results from these authorities that choses in action are "property owned" where the obligor resides. It may, however, be argued that the cases may not have intended to go so far, but merely to hold that choses in action, whatever might be said to be their local habitation, could *constitutionally* be taxed wherever they could be effectively reached and dealt with by the taxing power. In England no question of constitutional limitations arises, but only questions of construction. For that reason certain English decisions may be adduced as particularly helpful.

The general rule as to the locality of choses in action for purposes of probate is thus laid down by Abinger, C. B., delivering the opinion of the Court in *A. G. v. Bouwens*, 4 M. & W. 171, 191:

\* \* \* It was established as law, that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death \* \* \*.

In *Commissioners of Stamps v. Hope* (1891), A. C. 476, it was held that a debt created by an instrument under seal, viz, a mortgage deed, was a specialty, and as such assets for administration where it happened to be when the owner died. The Court said (pp. 481, 482):

A debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor \* \* \*.

In *New York Breweries Company v. A. G.* (1899), A. C. 62, it was held that an English company which transferred shares belonging to a nonresident alien, deceased, to his domiciliary executors thereby made itself an executor *de son tort*.

Lord Halsbury said (p. 69):

In one sense it is true that you get into a difficulty by treating the word "property" as meaning something necessarily connected with physical possession, and capable therefore of being treated by manual delivery; but if one comes to analyze its meaning, *it is manifest that a great many things, choses in action, with which we are dealing are, in the ordinary sense of the word "property," and capable of being treated, not indeed by physical handling, but by documents of title and instruments recognized by the law as transferring the title, the incorporeal right to sue (that is what is strictly comprehended in such phrases), documents which are capable of being enforced and treated as subjects of property.* [Italics ours.]

In *Lecouturier v. Ray* (1910), A. C. 262, 273, the Lord Chancellor said of a trade-mark belonging to an alien nonresident but registered in England:

This property (for property it is) which has come in question in this appeal is property situated in England, and must, therefore, be regulated and disposed of in accordance with the law of England.

In *Rez v. Lovitt* (1911), A. C. 212 (a case very similar to *Blackstone v. Miller*, *supra*), it was held that a bank deposit belonging to a nonresident was "property situate" where the bank was, for the purpose of a succession tax. The Court said (pp. 221, 222):

When, therefore, it is said that "*Mobilia sequuntur personam*" all that is meant is that

for certain limited purposes we deal with "mobilia" (or leave them to be dealt with) under the law governing their owner as though they were situate in his country instead of ours, and, in return, foreign countries generally do the like with regard to English movables situate abroad.

\* \* \* Here the Legislature of New Brunswick has expressly enacted that all property situate in the province shall be subject to a succession duty though the testator may have had his fixed place of abode or domicile outside the province. The Act purports to exclude the application of the maxim "*Mobilia sequuntur personam*" as regards personal estate within the province belonging to persons domiciled elsewhere, but to retain it as regards the property of New Brunswick citizens situate outside the province.

The principle at the basis of this decision seems not to be limited but to affirmed in *Royal Bank of Canada v. Rex* (1913), A. C. 283, 297, 298.

In *Inland Revenue Commissioners v. Muller & Company's Margarine* (1901), A. C. 217, the Court had under consideration the Stamp Act which exempted from its provisions a contract for the sale of "property locally situate out of the United Kingdom." It was held that the good will of a business built up and located in Germany was (a) property, and (b) locally situate out of the United Kingdom. All of the opinions of the several members of the Court are worthy of consideration, including Lord Halsbury's dissenting opinion. Cer-

tain statements of Lord Lindley are quoted on account of his learning in such matters. He said:

Good will is only taxable as property; and the legal conception of property appears to me to involve the legal conception of existence somewhere. Incorporeal property has no existence in nature and has, physically speaking, no locality at all. We, however, are dealing not with anything which in fact fills a portion of space, but with a legal conception, or, in other words, with rights regarded as property. But to talk of property as existing nowhere is to use language which to me is unintelligible.

The authorities which bear upon the locality of incorporeal personal property for purposes of probate appear to me to afford the best guides for the solution of the case before us. Those cases tend strongly to show that, for purposes of probate, good will, except so far as it merely enhances the value of lands and hereditaments, must be regarded as personal property situate somewhere; and if this were a probate case I do not suppose that anyone would say that the good will with which we have to deal would be regarded as in any sense situate in this country. The *Commissioner of Stamps v. Hope*, in which the locality of debts for probate purposes is considered, contains some valuable general remarks on the subject; but there is nothing in that case which conflicts with the view I take of this good will.

It may perhaps be true that property which has no physical existence may, if necessary, be treated for some purposes in one locality, and for other purposes in some other locality. But, until the necessity for so treating it is apparent, I see no justification for introducing confusion by judicially holding the same property to be legally situate in two different places at one and the same time. But this confusion would be introduced if your Lordships were to decide that the analogy of probate cases was to be no guide in dealing with liability to stamp duty.<sup>1</sup>

It is submitted that the foregoing authorities demonstrate that the practice of States to tax choses in action at the domicile of the obligor has the sanction of the law and that in so taxing them it is ordinary and proper usage for the legislature to describe them as "property owned" or "situated" there. It follows that if Congress is, as the plaintiff contends, to be assumed to have used language in its legal as distinguished from any popular meaning, nevertheless the words "property owned in the

<sup>1</sup> The English Courts have found difficulties in the construction of these words in the Stamp Act "property locally situate out of the United Kingdom," but, since the difficulty appears to arise entirely from the doubt in the minds of the particular Court as to the binding authority of certain decisions, the cases are merely referred to with the remark that Muller's Case does not seem to have been loyally followed, and that incorporeal rights are treated in these decisions as though they either were not "property," or had no local habitation, an impossible position in view of the decisions of the House of Lords and of this Court. The cases referred to are: *Smelting Company v. Commissioners* (1897), 1 Q. B. 175 (patents); *Danubian Sugar Factories v. Commissioners* (1901), 1 K. B. 245 (contract for purchase of land and personal services); *Velasquez v. Commissioners* (1914), 3 K. B. 458 (contract for the sale of "book" or "current" accounts).

United States" are fairly to be construed as covering rights like those here owned by the plaintiff.

It follows that the question certified by the Court of Appeals should be answered in the affirmative.

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